

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-217179, B-217547 **DATE:** June 26, 1985
MATTER OF: Ross Bicycles, Inc.

DIGEST:

1. Contracting agency is not required to provide technical data to all offerors in attempt to equalize alleged competitive advantage enjoyed by one offeror which already had access to the data, since the data were developed independently by the offeror's parent company and any advantage to the offeror thus was due solely to its parent company's prior experience.
2. Protester fails to show that company providing technical data to contracting agency for use in solicitation improperly modified data where only support is allegation by a former employee of the company, which is denied by the company, and, in any event, protester does not contend that technical data actually included in the solicitation were defective.
3. Protest regarding alleged solicitation defect is dismissed as untimely where initial protest on the same ground was untimely filed with the contracting agency.

Ross Bicycles, Inc. protests any award under request for proposals (RFP) No. DAAA09-84-R-8607, issued by the Army to acquire 28,750 M249 Squad Automatic Weapon (SAW) machine guns. Ross contends that the Army should have purchased and provided to all offerors certain manufacturing data which had been developed by a Belgian company, Fabrique Nationale Herstal (FNH). The data were available to the government pursuant to agreements with FNH related to development of a technical data package for the SAW procurement. We deny the protest in part and dismiss it in part.

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The technical data package for the SAW was to be based on the design of another machine gun, the Minimi, which had been developed by FNH. Because the Minimi was designed and manufactured in a European format, the Minimi technical data had to be converted to conform to American specifications before being used in the SAW solicitation. In May 1982, the government entered into a contract with FNH for delivery of the Minimi data needed to develop the technical data package for the SAW. That contract did not include purchase by the government of FNH's description of manufacture of the Minimi. Later, in November 1982, the government exercised its option to bring into effect a separate licensing agreement with FNH under which the government acquired the right to use the FNH Minimi technical data delivered under the May 1982 contract.

After the technical data package for the SAW was developed, the RFP was issued on June 29, 1984; proposals were due on October 2. Although best and final offers were called for on December 27, 1984, no award has yet been made.

Ross contends that another offeror, Fabrique Nationale Manufacturing, Inc. (FNMI), an American subsidiary of FNH, has a competitive advantage over other offerors by virtue of its relation to FNH. Specifically, Ross maintains that FNMI's access to FNH's description of manufacture for the Minimi made it easier for FNMI to develop its proposal and offer a lower price than other offerors who must devise their own manufacturing processes without the benefit of access to FNH's description of manufacture. Ross argues that the Army was obligated to neutralize FNMI's advantage by providing FNH's description of manufacture to all the offerors under the RFP.

The Army maintains that the information included in the technical data package for the SAW contained sufficient information for offers to prepare their proposals, despite the fact that FNH's description of manufacture was not included. In fact, the Army maintains that it deliberately chose not to include FNH's description of manufacture in the RFP because the Army intended that each offeror propose a manufacturing process tailored to its own equipment and capabilities, rather than rely on the process developed for the Minimi by FNH.

We find no basis on which to require that the Army provide to offerors the description of manufacture developed by FNH¹/. Ross does not maintain that the RFP failed to provide an adequate technical basis for preparation of a proposal; Ross argues only that access to FNH's manufacturing data facilitated preparation of FNMI's proposal and would have helped Ross prepare its own proposal as well. Specifically, Ross maintains that if it had access to the FNH manufacturing data, it would not have had to incur significant costs for engineering and design work and therefore would have been able to submit a lower priced proposal.

We have consistently recognized that a particular offeror may possess unique advantages and capabilities by virtue of its prior experience. Absent preferential treatment of that offeror or other unfair action by the government, we have held that any advantage thus obtained is not unfair and that the government is not required to attempt to equalize competition to compensate for it. See ENSEC Service Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD ¶ 34; Avitech Inc., B-214670, July 30, 1984, 84-2 CPD ¶ 125. Here, any advantage to FNMI was due solely to the prior experience of FNH, its parent company, an advantage which the government is not required to equalize. See B.B. Saxon Co., 57 Comp. Gen. 501, 513 (1978), 78-1 CPD ¶ 410; GTE Automatic Electric, Inc., B-209393, Sept. 19, 1983, 83-2 CPD ¶ 340. The fact that the Army incorporated some FNH technical data in the RFP, does not mean that the Army was required to provide all the data, including the manufacturing data, available from FNH.

Moreover, the manufacturing data which Ross seeks was not the product of a prior contract between FNH and the

¹/The parties disagree as to the extent of the Army's existing rights regarding FNH's description of manufacture. Ross appears to argue that the government's rights under the November 1982 licensing agreement include the right to disseminate the description of manufacture to Ross and the other offerors. The Army maintains that delivery of FNH manufacturing data was not covered by the May 1982 agreement and thus would have to be negotiated and paid for separately. We need not resolve this issue in view of our conclusion that the Army is not required to provide the data to Ross and the other offerors.

government; rather, under the licensing agreement and contract with FNH, the government acquired existing data which had been developed independently by FNH in connection with its own prior production of the Minimi. Thus, there was not even any indirect government involvement in development of the data from which FNMI's alleged competitive advantage is derived.

Further, there is nothing inherently objectionable in an agency's structuring a solicitation so that offerors must develop their own approaches to satisfying requirements simply because it will be less difficult for those who have performed similar work in the past. See Field Maintenance Services Corp., 56 Comp. Gen. 1008, 1010 (1977), 77-2 CPD ¶ 235; Lawrence Johnson & Associates, Inc., B-196442.2, Nov. 7, 1980, 80-2 CPD ¶ 344. In fact, by doing so, the Army in this case intended to encourage offerors to propose a manufacturing process suited to their own capabilities, rather than merely adopting FNH's process. See Science Information Services, Inc., B-207149.2, Nov. 29, 1982, 82-2 CPD ¶ 477.

Accordingly, we find no circumstances which would require that the government provide to Ross the Minimi manufacturing process data developed by FNH.

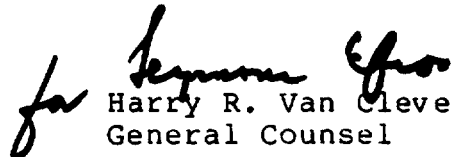
As a corollary to its principal argument, Ross contends that FNH intended to modify the technical data and drawings provided to the government so that the technical data package for the SAW procurement would be deficient for all offerors except FNH's subsidiary, FNMI. Ross' only support for this allegation is an affidavit of a former FNMI employee^{2/} which recounts a conversation between the former employee and the president of FNMI during which the intention to alter the technical information allegedly was expressed. The president of FNMI has submitted a counter-affidavit, denying that such a conversation ever took place. Moreover, while Ross

^{2/}The employee apparently was hired by Ross during the period when SAW proposals were being prepared. Relying on a noncompetition agreement signed by the employee while at FNMI, FNMI obtained a court order enjoining its former employee from working on the Ross SAW proposal.

alleges that FNH planned to alter the technical data in order to adversely affect the other offerors' ability to prepare proposals competitive with FNMI's proposal, Ross does not contend that the technical data actually used in the solicitation were defective due to improper modifications by FNH; at most, Ross contends that the government failed to include all the data it had received from FNH. As a result, we conclude that Ross has failed to offer any convincing evidence in support of its allegation that FNH improperly modified the technical data provided to the government.

Finally, in its response to the Army report, Ross contends that the RFP was defective for failure to indicate what weight would be given to an offeror's price relative to the technical evaluation of its proposal. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), (1985), this ground of protest, based on an alleged impropriety apparent on the face of the solicitation, was required to be filed before the closing date for receipt of initial proposals, October 2, 1984. Since Ross did not raise this issue until a letter to the Army dated October 10, its protest to the Army on this ground was untimely. Where, as here, a protest is filed first with the contracting agency, a subsequent protest to our Office will be considered only if the initial protest was timely. 4 C.F.R. § 21.2(a)(3). Since Ross' initial protest on this ground was not timely filed with the Army, that portion of its protest subsequently filed with this Office also is untimely and will not be considered. SAFE Export, Corp., B-213442, Mar. 19, 1984, 84-1 CPD ¶ 324.

The protest is denied in part and dismissed in part.


Harry R. Van Cleve
General Counsel